

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN COLLINS,

Plaintiff,

v.

VIRTELA TECHNOLOGY SERVICES,
INC.; and DOES 1 through 10,

Defendants.

No. C 12-613 CW

ORDER DENYING
PLAINTIFF'S MOTION
TO REMAND,
GRANTING IN PART,
AND DENYING IN
PART, DEFENDANT'S
MOTION TO COMPEL
ARBITRATION AND
SETTING A CASE
MANAGEMENT
CONFERENCE (Docket
Nos. 12, 13 and
42)

Plaintiff John Collins moves to remand this action to state court. Defendant Virtela Technology Services, Incorporated opposes Plaintiff's motion and moves to compel arbitration or dismiss the case for improper venue. Plaintiff opposes Defendant's motion. Having considered the papers filed by the parties and their arguments at the hearing, the Court GRANTS in part Plaintiff's motion to remand and DENIES it in part. The Court also GRANTS in part Defendant's motion to compel arbitration or dismiss and DENIES it in part.

BACKGROUND

Plaintiff, a resident of California, worked as a systems engineer for Defendant from July 14, 2008 through July 1, 2011. First Amended Complaint (1AC) ¶¶ 2, 7. During his employment, Plaintiff worked from his home office in California. Decl. of John Collins in Supp. of Opp. to Mot. to Compel Arb. (Collins Arb. Decl.) ¶ 7. He travelled to Defendant's headquarters in Greenwood Village, Colorado no more than fifteen times. Id.

1 When Plaintiff was hired and at various times during his
2 employment, he signed certain documents, which he was told that he
3 had to sign as a condition of employment. Collins Arb. Decl. ¶ 3.
4 The documents included an offer letter and agreement titled
5 "Employment, Confidential Information and Invention Assignment
6 Agreement," both of which Plaintiff signed on June 30, 2008. Id.
7 The documents bear Plaintiff's mailing address and appear to have
8 been mailed to Plaintiff at his home in California. Decl. of Gary
9 Schlisner in Supp. of Mot. to Compel Arb. (Schlisner Arb. Decl.)
10 ¶ 5, Ex. A. Defendant's Vice President of Finance and Controller,
11 Gary Schlisner, states that its employees who entered into the
12 contracts with Plaintiff did so by phone, mail and email from its
13 headquarters in Colorado. Decl. of Gary Schlisner in Supp. of
14 Defs.' Reply to Mot. to Compel Arb. (Schlisner Arb. Reply Decl.)
15 ¶¶ 2-3.

16 The offer letter included the following clauses, among
17 others:

18 2. At-Will Employment. You acknowledge that your
19 employment with Virtela is for an unspecified duration
20 that constitutes at-will employment, and that either you
21 or Virtela can terminate this relationship at any time,
22 with or without cause and with or without notice. The
23 terms of this offer letter, therefore, do not create
24 either an express and/or implied contract of employment
25 with Virtela. No manager or representative of Virtela,
26 other than the President of Virtela, has authority to
27 enter into any agreement for employment for any
28 specified period of time or to make any agreement or
contract to the foregoing, and any promises to the
contrary may only be relied upon by you if they are in
writing and signed by the President of Virtela.

• • •

7. Confidential Information. You agree that your
employment is contingent upon execution of, and delivery
to, Virtela of an Employment, Confidential Information

and Invention Assignment Agreement in the standard form utilized by Virtela for its employees.

. . .

10. General Provisions.

(a) This offer letter will be governed by the laws of the State of Colorado, applicable to agreements made and to be performed entirely within such state.

(b) This offer letter sets forth the entire agreement and understanding between Virtela and you relating to your employment and supersedes all prior verbal discussion between us. Any subsequent change or changes in your duties, salary or other compensation will not affect the validity or scope of this offer letter. Any changes to the at-will term and nature of your employment must be executed in writing and signed by you and the President of Virtela.

. . .

Please acknowledge and confirm your acceptance of this letter by signing and returning the enclosed copy of this offer letter, and the Employment, Confidential Information and Invention Assignment Agreement. . . .

Schlisner Arb. Decl. ¶ 5, Ex. A.

The Employment, Confidential Information and Invention Assignment Agreement stated, among other things:

1. At-Will Employment. I understand and acknowledge that my employment with the Company is for an unspecified duration and constitutes "at-will" employment. I acknowledge that this employment relationship may be terminated at any time, with or without good cause or for any or no cause, at the option of either the Company or myself, with or without notice.

2. Confidential Information. . . .

3. Inventions. . . .

5. Returning Company Documents. . . .

10. Arbitration and Equitable Relief.

(a) Arbitration. Except as provided in Section 10(b) below, I agree that any dispute or controversy arising out of or relating to any interpretation, construction, performance or breach

of this Agreement, shall be settled by arbitration to be held in the State of Colorado, in accordance with the rules then in effect of the American Arbitration Association. The arbitrator may grant injunctions or other relief in such dispute or controversy. The decision of the arbitrator shall be final, conclusive and binding on the parties to the arbitration. Judgment may be entered on the arbitrator's decision in any court having jurisdiction. The Company and I shall each pay one-half of the costs and expenses of such arbitration, and each of us shall separately pay our counsel fees and expenses.

(b) Equitable Remedies. I agree that it would be impossible or inadequate to measure and calculate the Company's damages from any breach of the covenants set forth in Sections 2, 3, and 5 herein. Accordingly, I agree that if I breach any of such Sections, the Company will have available, in addition to any other right or remedy available, the right to obtain an injunction from a court of competent jurisdiction restraining such breach or threatened breach and to specific performance of any such provision of this Agreement. I further agree that no bond or other security shall be required in obtaining such equitable relief and I hereby consent to the issuance of such injunction and to the ordering of specific performance.

11. General Provisions.

(a) Governing Law; Consent to Personal Jurisdiction. The laws of the State of Colorado will govern this Agreement. I hereby expressly consent to the personal jurisdiction of the state and federal courts located in Colorado for any lawsuit filed there against me by the Company arising from or relating to this Agreement.

(b) Entire Agreement. This Agreement sets forth the entire agreement and understanding between the Company and me relating to the subject matter herein and merges all prior discussions between us.

. . .

(c) Severability. If one or more provisions in this Agreement are deemed void by law, then the remaining provisions will continue in full force and effect.

Id. at ¶ 6, Ex. B. In other documents, Defendant refers to this agreement as the "Confidential Information Agreement" or the "Confidentiality Agreement." Id. at ¶ 7, Ex. C, 29, 31.

1 The parties subsequently signed two agreements on July 14,
2 2008 and February 19, 2009, related to the Sales Engineer Bonus
3 Plan. Id. at ¶ 7, Ex. C; Schlisner Arb. Reply Decl. ¶ 7, Ex. A.
4 Both contained, in addition to various provisions related to the
5 Bonus Plan, an at-will employment clause and a choice of law
6 clause selecting Colorado as the governing law. Id. The 2007
7 Bonus Plan, signed on July 14, 2008, contained a forum selection
8 clause, providing that by signing the agreement, "you agree that
9 you can only sue the Company under or relating to this Plan in the
10 state or federal courts in Denver County, Colorado (jurisdiction
11 and venue)." Id. at ¶ 7, Ex. C, 29. The 2009 Bonus Plan did not
12 contain any such clause. In addition, the 2009 Bonus Plan
13 included an arbitration clause, providing, "Any disputes brought
14 by you under this Plan shall be subject to binding arbitration in
15 accordance with the terms of your Confidential Information
16 Agreement." Id. at ¶ 7, Ex. A, 5.

17 Plaintiff, who is sixty-two years old, alleges that he
18 performed his work well for Defendant and received positive
19 performance reviews. Id. at ¶¶ 9-10, 12, 17. He further contends
20 that he was terminated in favor of a younger, Indian replacement
21 and was given no explanation other than that "the company was
22 going in a new direction." Id. at ¶ 16. Plaintiff also alleges
23 that the termination breached the terms and conditions of his
24 employment agreement, which included that he "would be able to
25 continue his employment with defendant indefinitely as long as he
26 carried out his duties in a proper and competent manner" and that
27 he "would not be demoted, discharged, or otherwise disciplined,
28

1 nor would Plaintiff's job functions be reassigned for other than
2 good cause with notice thereof." Id. at ¶ 39.

3 Plaintiff filed this action on January 12, 2012 in the
4 Alameda County Superior Court, and served Defendant the following
5 day. Plaintiff filed the 1AC on January 30, 2012. In the 1AC,
6 Plaintiff asserts seven claims against Defendant arising under
7 California statutory and common law: (1) age discrimination in
8 violation of the Fair Employment and Housing Act (FEHA), Cal. Gov.
9 Code §§ 12900, et seq.; (2) national origin discrimination in
10 violation of FEHA; (3) breach of employment contract; (4) breach
11 of the covenant of good faith and fair dealing; (5) wrongful
12 termination in violation of public policy; (6) refusal to permit
13 inspection and copying of personnel and payroll documents; and
14 (7) unfair business practices. 1AC ¶¶ 20-66.

15 Defendant removed this action on February 7, 2012 under 28
16 U.S.C. §§ 1332 and 1441. Notice of Removal (NOR) ¶ 1. Defendant
17 states that there is total diversity between the parties and that
18 the amount in controversy exceeds \$75,000. Id. at ¶¶ 1, 7.
19 Defendant also alleges that its principal place of business at the
20 time of filing and removal was in Colorado. Id. at ¶ 1. On the
21 civil cover sheet, in the section for divisional assignment,
22 Defendant placed an X in the box next to San Jose. Docket No.
23 1-5.

24 Plaintiff filed his motion to remand on February 24, 2012.
25 Defendant filed its motion to compel arbitration on the same day.

26 On February 29, 2012, a clerk's notice was filed, stating
27 that "due to a clerical error regarding venue, this action was
28 assigned to the San Jose Division, and it should have been

1 assigned to either the San Francisco or Oakland Divisions."
2 Docket No. 17. The case was then re-assigned to the undersigned.
3 Docket No. 18.

4 DISCUSSION

5 I. Motion to Remand

6 A. Legal Standard

7 A defendant may remove a civil action filed in state court to
8 federal district court so long as the district court could have
9 exercised original jurisdiction over the matter. 28 U.S.C.
10 § 1441(a). Title 28 U.S.C. § 1447(c) provides that if, at any
11 time before judgment, it appears that the district court lacks
12 subject matter jurisdiction over a case previously removed from
13 state court, the case must be remanded. On a motion to remand,
14 the scope of the removal statute must be strictly construed. Gaus
15 v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). "The 'strong
16 presumption' against removal jurisdiction means that the defendant
17 always has the burden of establishing that removal is proper."
18 Id. Courts should resolve doubts as to removability in favor of
19 remanding the case to state court. Id.

20 B. Discussion

21 Plaintiff contends that the removal was procedurally
22 defective, Defendant did not sufficiently allege that Plaintiff is
23 a California citizen, and Defendant's principal place of business
24 is California, not Colorado.

25 1. Procedural defect in removal

26 Plaintiff argues that Defendant's removal was procedurally
27 defective because of its selection of the San Jose division.
28 Plaintiff further contends that the Court's subsequent

1 re-assignment of the action to the proper division did not remedy
2 Defendant's error.

3 Title 28 U.S.C. section 1446 requires that, when removing a
4 civil action from state court to federal court, a defendant is
5 required to file a notice of removal "in the district court of the
6 United States for the district and division within which such
7 action is pending." 28 U.S.C. § 1446(a). "Under 28 U.S.C.
8 § 1406(a), when there is 'a case laying venue in the wrong
9 division or district[,] the district court 'shall dismiss, or if
10 it be in the interest of justice, transfer such case to any
11 district or division in which it could have been brought.'" LN
12 Corp. v. STK Fin., LLC, 2011 WL 4345193, at *2 (N.D. Cal.)
13 (brackets in original). Other judges in the Northern District of
14 California have concluded that, under this statutory scheme, when
15 a case is removed to the incorrect district or division, the court
16 "may transfer the instant action to the correct venue where the
17 notice of removal should have been filed." Id. See Capretto v.
18 Stryker Corp., 2007 WL 2462138, at *1 n.1 (N.D. Cal.) (noting that
19 a case removed to the wrong district should be transferred and not
20 remanded, if federal jurisdiction is otherwise proper). See also
21 Shamrock Mfg. Co. v. Ammex Corp., 2010 WL 3153976, at *1-8 (E.D.
22 Cal.) (noting that there is no controlling Supreme Court or Ninth
23 Circuit authority regarding whether a case removed to the wrong
24 district should be remanded or transferred, collecting cases, and
25 finding that "the better view supports the transfer").

26 Thus, although Defendant should have requested assignment of
27 the case to the San Francisco/Oakland Division upon removal, the
28 Court properly could remedy the deficiency by transferring the

1 action to the proper division. Here, the case has already been
2 transferred and is currently pending in the division that
3 Plaintiff agrees is correct. The Court DENIES Plaintiff's motion
4 to remand based on the defect in the civil cover sheet.

5 2. Failure to plead Plaintiff's citizenship

6 Plaintiff also argues that, because Defendant has plead only
7 that he is a resident of California, it has not plead citizenship
8 sufficiently to meet the requirements for diversity jurisdiction
9 under 28 U.S.C. § 1332, and the case should be remanded to state
10 court.

11 In a case in which the complaint and notice of removal also
12 similarly stated that the plaintiffs were "'residents' of
13 California," the Ninth Circuit noted "the diversity jurisdiction
14 statute, 28 U.S.C. § 1332, speaks of citizenship, not of
15 residency." Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th
16 Cir. 2001). "The natural person's state citizenship is . . .
17 determined by her state of domicile, . . . her permanent home,
18 where she resides with the intention to remain or to which she
19 intends to return." Id. "A person residing in a given state is
20 not necessarily domiciled there, and thus is not necessarily a
21 citizen of that state." Id. "Absent unusual circumstances, a
22 party seeking to invoke diversity jurisdiction should be able to
23 allege affirmatively the actual citizenship of the relevant
24 parties." Id. (citing Whitmire v. Victus Ltd. T/A Master Design
25 Furniture, 212 F.3d 885, 887 (5th Cir. 2000) ("In a diversity
26 action, the plaintiff must state all parties' citizenships such
27 that the existence of complete diversity can be confirmed.")).
28 Here, as in Kanter, "[s]ince the party asserting diversity

1 jurisdiction bears the burden of proof," Defendant's "failure to
2 specify [Plaintiff's] state citizenship was fatal to [its]
3 assertion of diversity jurisdiction." Id. at 857-58.

4 However, contrary to Plaintiff's assertions, the Court may
5 decline to remand the action at this time and instead grant
6 Defendant leave to amend its notice of removal to cure this
7 jurisdictional deficiency. In Kanter, the Ninth Circuit found
8 that the defendant "could potentially have cured its defective
9 allegations regarding citizenship by amending its notice of
10 removal," especially because, as here, the plaintiffs had never
11 disputed their citizenship. Id. at 858 (citing 28 U.S.C. § 1653;
12 Jacobs v. Patent Enforcement Fund, Inc., 230 F.3d 565, 568 n.3 (2d
13 Cir. 2000); 15 James Wm. Moore et al., Moore's Federal Practice
14 § 102.17[1], at 102-31 (3d ed. 2001)).

15 Accordingly, the Court GRANTS Defendant leave to amend its
16 notice of removal within seven days of the date of this Order to
17 allege specifically that Plaintiff is a citizen of California.
18 Plaintiff may renew his motion to remand on this ground only
19 within two weeks thereafter, if Plaintiff can argue in good faith
20 that Defendant has failed to file an amended notice of removal or
21 has failed to allege his citizenship properly in its amended
22 notice of removal.

23 3. Defendant's citizenship

24 The parties dispute the state citizenship of Defendant for
25 diversity purposes. The diversity statute states that "a
26 corporation shall be deemed to be a citizen of any State by which
27 it has been incorporated and of the State where it has its
28 principal place of business." 28 U.S.C. § 1332(c)(1). The

1 parties agree that Defendant's state of incorporation is Delaware.
2 1AC ¶ 2; NOR ¶ 1. At issue is whether Defendant's "principal
3 place of business" is Colorado or California.

4 The Supreme Court recently discussed this issue in great
5 detail in Hertz Corp. v. Friend, 130 S.Ct. 1181 (2010). Under
6 that opinion, a corporation has one principal place of
7 business--its "nerve center." Id. at 1192-93. This refers to the
8 place where "the officers direct, control, and coordinate the
9 corporation's activities," which frequently, but not always, is
10 "the place where the corporation maintains its headquarters." Id.
11 at 1192. The Court noted that, under this test, "there will be
12 some hard cases," especially "in this era of telecommuting," in
13 which "some corporations may divide their command and coordinating
14 functions among officers who work at several different locations,
15 perhaps communicating over the Internet." Id. at 1194.

16 Contrary to Defendant's argument that "Plaintiff has utterly
17 failed to establish that Virtela's nerve center was California,
18 and not Colorado," Opp. to Mot. to Remand at 6, as the party
19 seeking the jurisdiction of this Court, Defendant has the burden
20 of establishing that its principal place of business is outside
21 California. Hertz, 130 S.Ct. at 1194. "When jurisdiction is
22 challenged, the party asserting federal jurisdiction must present
23 'competent proof' to substantiate its jurisdictional allegations."
24 Ganesan v. GMAC Mortg., LLC, 2011 WL 1496099, at *2 (N.D. Cal.).

25 In support of its assertion that its principal place of
26 business is in Colorado, Defendant offers the declaration of Gary
27 Schlisner. In his declaration, Schlisner attests that Defendant
28 has identified its own principal place of business as Greenwood

1 Village, Colorado, in numerous places, including on its website,
2 federal tax filings, corporate records, filings with the
3 California and Colorado Secretaries of State, and press releases.
4 Schlisner Decl. in Opp. to Mot. to Remand (Schlisner Remand Decl.)
5 ¶¶ 4-8. According to Schlisner, Defendant currently employs three
6 individuals working in California and 142 individuals working in
7 Colorado, as well as eleven people in other states and about 200
8 people outside of the United States. Id. at ¶ 9. Schlisner
9 further states that "Greenwood Village, Colorado, Virtela's
10 headquarters, is the place of actual direction, control, and
11 coordination," because it is where "nearly all of Virtela's high-
12 level officers are based" and where "they make significant
13 corporate decisions . . . , set corporate policy, engage in
14 strategic decision-making and are responsible for oversight of
15 their areas of responsibility and supervision of employees." Id.
16 at ¶ 10. Schlisner states that ten of twelve of the company's
17 current vice presidents are based in Greenwood, although he
18 acknowledges that one of the other two vice presidents is based in
19 California. Id. at ¶ 11. He represents that the other vice
20 presidents that Plaintiff contends are based in California no
21 longer work with the company. Id. at ¶ 22.

22 Plaintiff argues that Defendant's nerve center is in
23 California. Plaintiff states in his declaration that, according
24 to Defendant's website, the majority of members of their
25 five-person board of directors are based in California. Collins
26 Decl. in Supp. of Mot. to Remand (Collins Remand Decl.) ¶ 9.
27 Plaintiff also attests that Defendant's president and Chief
28 Executive Officer, B.V. Jagadeesh, was based in California and

1 worked from California more than seventy-five percent of the time.
2 Id. at ¶ 3. Plaintiff states that during his trips to Colorado,
3 he seldom saw Jagadeesh, and that others based in Colorado told
4 him that they rarely saw Jagadeesh there. Id. at ¶ 4. Similarly,
5 Plaintiff states that Jagadeesh's predecessor, Vab Goel, worked
6 from his office in California eighty percent of the time. Id. at
7 ¶ 6. Plaintiff bases these estimates on his personal involvement
8 with them, statements that they made while he was on the phone
9 with them, and statements of Defendant's other employees,
10 including its current vice-president of sales. Id. at ¶ 3, 6.¹

11 Defendant replies that, as of March 14, 2012--two days before
12 Defendant filed its opposition to Plaintiff's motion to remand--
13 Jagadeesh's employment with Defendant ended and thus, "whatever
14 may have been the case in the past," Defendant currently "has no
15 CEO that is directing, controlling, and coordinating Virtela's
16 operations in California." Opp. to Mot. to Remand 6. The Court
17 rejects this argument. Under the time-of-filing rule, which the
18

19
20 ¹ Defendant challenges the admissibility of the statements
21 made by Plaintiff in his declaration. Defendant contends that he
22 provides no foundation for his statements that Jagadeesh and Goel
23 primarily worked out of California and that his statements are
24 based on inadmissible hearsay. The Court agrees that Plaintiff's
25 statements regarding what his former co-workers told him about
26 executives' work schedules are inadmissible hearsay and SUSTAINS
27 its objection regarding these statements.

28 In contrast, Plaintiff has established a proper foundation
for his statements that Jagadeesh and Goel worked out of
California, namely what he heard them say on the phone regarding
where they were and when he saw them in the offices in California
and Colorado. Thus, the Court OVERRULES Defendant's objections to
these statements. However, the Court notes that Defendant's
criticisms of Plaintiff's statements, that Plaintiff was not
frequently at either the California or Colorado office, are
well-taken and do reduce the weight of this evidence.

1 Supreme Court has recognized as "hornbook law . . . taught to
2 first-year law students in any basic course on federal civil
3 procedure," "all challenges to subject-matter jurisdiction
4 premised upon diversity of citizenship" are measured "against the
5 state of facts that existed at the time of filing--whether the
6 challenge be brought shortly after filing, after the trial, or
7 even for the first time on appeal." Grupo Dataflux v. Atlas
8 Global Group, L.P., 541 U.S. 567, 571 (2004). See also Strotek
9 Corp. v. Air Transp. Ass'n. of Am., 300 F.3d 1129, 1131 (9th Cir.
10 2002) (recognizing "the core principle of federal removal
11 jurisdiction on the basis of diversity--namely, that it is
12 determined (and must exist) as of the time the complaint is filed
13 and removal is effected"). "Once jurisdiction attaches, a party
14 cannot thereafter, by its own change of citizenship, destroy
15 diversity." Id. at 1132 (citing Wisconsin Dep't of Corrections v.
16 Schacht, 524 U.S. 381, 391 (1998); Southern Pac. Co. v. Haight,
17 126 F.2d 900, 903 (9th Cir. 1942)). Thus, the fact that Defendant
18 had a change in its highest officer shortly before opposing this
19 motion is irrelevant to the question of whether diversity
20 jurisdiction existed when the action was filed and removed.

21 Nonetheless, the Court finds that Defendant has established
22 sufficiently that Defendant's nerve center is in Colorado.
23 Defendant's own representations on official filings of the
24 location of its principal place of business are insufficient by
25 themselves to establish this fact, without additional facts
26 corroborating that location is where its officers direct, control,
27 and coordinate its business. See Hertz, 130 S.Ct. at 1295 ("the
28 mere filing of a form . . . listing a corporation's 'principal

1 executive offices' would, without more," be insufficient proof to
2 establish a corporation's "nerve center"). Here, Defendant has
3 provided such facts. It was in Colorado that almost all of the
4 high level officers, including the Chief Technology Officer, the
5 Senior Vice President of Engineering and Operations, and the Human
6 Resources Director, directed, controlled and coordinated the
7 corporate activities. Although Jagadeesh resided in California
8 and conducted some business there, he also "spent a substantial
9 amount of time in Colorado directing, controlling, and
10 coordinating Virtela's operations and generally conducting company
11 business." Schlisner Remand Decl. ¶ 25. Further, although
12 Jagadeesh "may have [had] the ultimate authority, . . . this is
13 not the test articulated by the Supreme Court in Hertz." Centrue
14 Bank v. Golf Disc. of St. Louis, Inc., 2010 WL 4178942, at *3
15 (E.D. Mo.) (finding, under the facts of that case, that the nerve
16 center of a business was not the satellite office from which the
17 CEO worked). Instead, Supreme Court directed that, in cases where
18 a company's directing functions are divided among officers who are
19 located in different places, the test for the corporate nerve
20 center "points courts in a single direction, toward the center of
21 overall direction, control, and coordination." Hertz, 130 S.Ct.
22 at 1194. Here, the overall, day-to-day direction, control, and
23 coordination came from the Colorado office.

24 Thus, the Court finds that Defendant's principal place of
25 business is in Greenwood Village, Colorado and that there is
26 complete diversity between the parties here, assuming that
27 Defendant is able to allege truthfully that Plaintiff is a citizen
28

1 of California and not Colorado. Accordingly, the Court DENIES
2 Plaintiff's motion to remand on this basis.

3 II. Motion to Compel Arbitration

4 A. Legal Standard

5 Under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et
6 seq., written agreements that controversies between the parties
7 shall be settled by arbitration are valid, irrevocable and
8 enforceable. 9 U.S.C. § 2. A party aggrieved by the refusal of
9 another to arbitrate under a written arbitration agreement may
10 petition the district court which would, save for the arbitration
11 agreement, have jurisdiction over that action, for an order
12 directing that arbitration proceed as provided for in the
13 agreement. Id. § 4. See Bridge Fund Capital Corp. v. Fastbucks
14 Franchise Corp., 622 F.3d 996, 1005 (9th Cir. 2010) (noting that
15 the party seeking to compel arbitration bears the burden of
16 proving the existence of a valid arbitration agreement by a
17 preponderance of the evidence). When presented with a motion to
18 compel arbitration, if the court is satisfied "that the making of
19 the arbitration agreement or the failure to comply with the
20 agreement is not in issue, the court shall make an order directing
21 the parties to proceed to arbitration in accordance with the terms
22 of the agreement." Id. § 4. The FAA applies in both federal
23 diversity cases and state court cases, where it pre-empts state
24 statutes invalidating such agreements. Allied-Bruce Terminix
25 Companies, Inc. v. Dobson, 513 U.S. 265, 271-72 (1995).

26 The FAA reflects a "liberal federal policy favoring
27 arbitration agreements." AT&T Mobility LLC v. Concepcion, 131 S.
28 Ct. 1740, 1745 (2010) (citations and internal quotation marks

omitted). A district court must compel arbitration under the FAA if it determines that: (1) there is a valid agreement to arbitrate; and (2) the dispute falls within its terms. Stern v. Cingular Wireless Corp., 453 F. Supp. 2d 1138, 1143 (C.D. Cal. 2006) (citing Chiron Corp. v. Ortho Diagnostic Sys., 207 F.3d 1126, 1130 (9th Cir. 2000)). "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986) (citations omitted).

B. Discussion

The parties dispute both the validity of the arbitration agreement and whether the dispute falls within its terms. The parties also dispute whether California or Colorado law controls this determination.

1. Choice of Law

The parties both acknowledge that the Employment, Confidential Information and Invention Assignment Agreement has a clause selecting Colorado law to govern its interpretation. Plaintiff contends that California law should govern notwithstanding this clause.

"It is well-settled that in diversity cases federal courts must apply the choice-of-law rules of the forum state." Estate of Darulis v. Garate, 401 F.3d 1060, 1062 (9th Cir. 2005). California law thus determines the effect of the contractual choice-of-law provision. Under California law, there is a "strong policy favoring enforcement of [choice-of-law] provisions." Nedlloyd Lines B.V. v. Sup. Ct., 3 Cal. 4th 459, 464-65 (1992).

1 To determine whether a choice-of-law provision is enforceable,
2 California courts follow the Restatement (Second) of Conflict of
3 Laws § 187, which provides that a choice-of-law provision will be
4 enforced unless either,

5 (a) the chosen state has no substantial relationship to
6 the parties or the transaction and there is no other
reasonable basis for the parties' choice, or

7 (b) application of the law of the chosen state would be
8 contrary to a fundamental policy of a state which has a
9 materially greater interest than the chosen state in the
10 determination of the particular issue and which, under
the rule of § 188, would be the state of the applicable
law in the absence of an effective choice of law by the
parties.

11 Restatement (Second) of Conflict of Laws § 187(2).

12 "A substantial relationship exists where one of the parties
13 is domiciled or incorporated in the chosen state." ABF Capital
14 Corp. v. Osley, 414 F.3d 1061, 1065 (9th Cir. 2005) (citing
15 Nedlloyd, 3 Cal. 4th at 467). This prong is satisfied where one
16 party had its principal place of business in the chosen state.
17 See PAE Gov't Servs. v. MPRI, Inc., 514 F.3d 856, 860 (9th Cir.
18 2007). Because Defendant's principal place of business is in
19 Colorado, this requirement is met.

20 The parties dispute whether application of Colorado law is
21 contrary to a fundamental policy of California. Regardless, the
22 Court concludes that California does not have a materially greater
23 interest in the outcome of this case than Colorado. To determine
24 whether California has a materially greater interest than
25 Colorado, the court "must analyze the following factors: (1) the
26 place of contracting; (2) the place of negotiation of the
27 contract; (3) the place of performance; (4) the location of the
28 subject matter of the contract; and, (5) the domicile, residence,

1 nationality, place of incorporation, and place of business of the
2 parties." Ruiz v. Affinity Logistics Corp., 667 F.3d 1318, 1324
3 (9th Cir. 2012) (citations omitted). These factors favor both
4 states equally. Based on the evidence before the Court, both
5 states were the places of contracting and negotiation of the
6 contract; Plaintiff, located in California, communicated with
7 Defendant, located in Colorado, by telephone, email and mail to
8 accomplish these tasks. The employment contract was performed in
9 both California and Colorado. During his employment, Plaintiff
10 lived in California, tele-commuted with colleagues who were
11 located in Colorado, and periodically traveled to Colorado to
12 carry out business. Defendant carried out its side of the
13 contract primarily from Colorado, from which it paid and
14 supervised Plaintiff. Defendant's primary place of business is in
15 Colorado, and Plaintiff resides in California.

16 Because California does not have a greater interest in the
17 outcome of this case, the Court finds that the choice of law
18 provision is enforceable. Accordingly, Colorado law applies.

19 2. Scope of Agreement

20 The parties dispute whether the dispute falls within the
21 scope of the parties' agreement to arbitrate. The Court notes
22 that there are two different arbitration clauses in the parties'
23 contracts. The first clause, upon which Defendant primarily
24 relies, appears in the Employment, Confidential Information and
25 Invention Assignment Agreement. Defendant argues that, because
26 this clause appears in an "employment agreement" that Plaintiff
27 signed in conjunction with the offer letter, it requires that all
28 disputes related to the terms and conditions of employment be

1 submitted to arbitration. Plaintiff argues that the agreement
2 primarily addresses confidentiality and that the clause applies at
3 most to claims that relate to at-will employment.

4 The language of the first clause, by its terms, does not
5 encompass every employment-related dispute that may arise between
6 the parties; it is limited to those "arising out of or relating to
7 any interpretation, construction, performance or breach" of the
8 Employment, Confidential Information and Invention Assignment
9 Agreement. "The use of 'arising out of' and 'relating to'" in
10 that agreement "establishes that the arbitration clause is broadly
11 construed." Oracle Am., Inc. v. Myriad Group AG, 2011 WL 3862027,
12 at *6 (N.D. Cal.) (quoting Cape Flattery Ltd. v. Titan Maritime,
13 LLC, 647 F.3d 914, 922 (9th Cir. 2011) ("when parties intend to
14 include a broad arbitration provision, they provide for
15 arbitration 'arising out of or relating to' the agreement.")); see
16 also P & P Indus., Inc. v. Sutter Corp., 179 F.3d 861, 871 (10th
17 Cir. 1999) (finding that an arbitration clause stating that "any
18 controversy, claim, or breach arising out of or relating to this
19 Agreement" was "a broad arbitration clause"). Courts have
20 explained that "such language 'reaches every dispute between the
21 parties having a significant relationship to the contract and all
22 disputes having their origin or genesis in the contract.'" Oracle,
23 2011 WL 3862027, at *6 (quoting Simula, Inc. v. Autoliv,
24 Inc., 175 F.3d 716, 721 (9th Cir. 1999)); see also P & P, 179 F.3d
25 at 871 (holding that "all claims with a significant relationship
26 to the Agreement, regardless of the label attached to them, arise
27 out of and are related to the Agreement") (internal quotation
28 marks and formatting omitted). Thus, "[t]o require arbitration,

1 [plaintiff]'s factual allegations need only 'touch matters'
2 covered by the contract containing the arbitration clause and all
3 doubts are to be resolved in favor of arbitrability." Id.
4 (quoting Simula, 175 F.3d at 721).

5 Here, the allegations underlying some, but not all, of
6 Plaintiff's claims "touch matters" related to this contract.
7 First, the breach of contract and breach of covenant of good faith
8 and fair dealing claims contain allegations that directly relate
9 to Plaintiff's status as an at-will employee. See 1AC ¶¶ 39-41,
10 48. Accordingly, the Court finds that these claims fall within
11 the terms of the arbitration agreement.

12 Defendant contends that the arbitration agreement extends to
13 Plaintiff's claims for discrimination under FEHA and wrongful
14 termination in violation of public policy, because it "will
15 necessarily point to [the Employment, Confidential Information and
16 Invention Assignment Agreement] to establish Plaintiff's at-will
17 status and explain that it had the absolute right to terminate
18 Plaintiff at-will, and that such a termination does not constitute
19 age discrimination . . ." Reply at 11. Plaintiff responds that
20 at-will employment is not a defense to claims for wrongful
21 termination in violation of public policy or state law
22 discrimination claims. Historically, pursuant to the at-will
23 employment doctrine under Colorado law, "either the employer or
24 the employee was free to terminate the employment at any time for
25 no cause whatever and without notice." Martin Marietta Corp. v.
26 Lorenz, 823 P.2d 100, 106 (Colo. 1992). In Martin Marietta, the
27 Colorado Supreme Court recognized a public policy exception to
28 this doctrine. Id. at 108-10. Under the public policy exception,

1 an employee may bring a claim for wrongful termination if the
2 discharge was based on a refusal to engage in conduct that would
3 violate public policy, or participation in conduct that is
4 protected or encouraged by public policy. Coors Brewing Co. v.
5 Floyd, 978 P.2d 663, 666-67 (Colo. 1999) (en banc). In several
6 cases after Martin Marietta, Colorado federal district court cases
7 refused to extend the doctrine to encompass claims invoking public
8 policy against certain types of discrimination and retaliation,
9 because an existing statute already provided a remedy for the
10 wrongful termination. See Basile v. Missionary Sisters of the
11 Sacred Heart of Jesus-Stella Maris Province, 2011 U.S. Dist. LEXIS
12 137694, at *5-6 (D. Colo.) (wrongful termination claim based on
13 age discrimination barred because already protected by the Age
14 Discrimination in Employment Act); Hein v. AT&T Operations, Inc.,
15 2010 U.S. Dist. LEXIS 133809, at *17-18 (D. Colo.) (wrongful
16 termination claim based on retaliation barred because already
17 protected by the Sarbanes-Oxley Act of 2002); Gorkin v. Vinnell
18 Corp., 2006 U.S. Dist. LEXIS 18836, at *15 (D. Colo.) (wrongful
19 termination claim based on national origin discrimination barred
20 because remedy available under Title VII); Endahl v. Vinnell
21 Corp., 2006 U.S. Dist. LEXIS 1617, at *28-29 (D. Colo.) (wrongful
22 termination claim based on age and national origin discrimination
23 barred because the Colorado Anti-Discrimination Act provides a
24 remedy; the fact that the plaintiff there had not asserted claims
25 under that statute "is irrelevant"). However, although at-will
26 employment status is generally not a defense for FEHA claims, the
27 at-will employment term relates to central issues for this claim.
28 Accordingly, the Court concludes that Plaintiff's claims for

1 wrongful termination and violation of FEHA relate to or arise out
2 of his at-will employment status and that arbitration of these
3 claims is required.

4 Further, to the extent that Plaintiff's UCL claim is based on
5 his claims for breach of contract, breach of covenant of good
6 faith and fair dealing, wrongful termination and violation of
7 FEHA, it also relates to his status as an at-will employee. See
8 1AC ¶¶ 50-67 (incorporating other claims).

9 Finally, Plaintiff's claim for refusal to permit inspection
10 and copying of personnel and payroll documents does not arise out
11 of or relate to the at-will employment clause in the Employment,
12 Confidential Information and Invention Assignment Agreement.
13 Accordingly, the Court finds that this claim does not fall within
14 the scope of the first arbitration clause. Further, to the extent
15 Plaintiff's UCL claim is premised on this claim, the UCL claim
16 also does not fall within the scope of this arbitration clause.

17 The second arbitration clause, to which Defendant only
18 briefly referred in its motion to compel arbitration, see Mot. to
19 Compel Arb. at 10:20-21, uses more limited language. That clause,
20 which appears in the 2009 Bonus Plan, applies by its terms to
21 disputes brought "under this Plan" only. Schlisner Reply Decl.
22 ¶ 7, Ex. A, at 5. Courts have held that arbitration clauses that
23 use the language "arising under" should be interpreted narrowly.
24 Cape Flattery, 647 F.3d at 921. See also Mediterranean
25 Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458, 1464 (9th
26 Cir. 1983) ("arising hereunder" is intended to cover a much
27 narrower scope of disputes, i.e., only those relating to the
28 interpretation and performance of the contract itself").

1 Plaintiff does not allege a breach of the terms and conditions set
2 forth in the 2009 Bonus Plan. Accordingly, the Court finds that
3 the arbitration clause in the 2009 Bonus Plan does not require
4 arbitration of these claims.

5 3. Validity of Agreement

6 "In determining the validity of an agreement to arbitrate,
7 federal courts should apply ordinary state-law principles that
8 govern the formation of contracts." Coneff v. AT & T Corp., 673
9 F.3d 1155, 2012 WL 887598, at *5 (9th Cir. 2012) (quoting Ferguson
10 v. Countrywide Credit Indus., 298 F.3d 778, 782 (9th Cir. 2002)).
11 Accordingly, the Court applies Colorado contract law.

12 Defendant argues that the agreement is valid under Colorado
13 law. Plaintiff responds that it is invalid under California law
14 and does not address Colorado law directly.

15 Colorado courts consider several factors in evaluating the
16 unconscionability of an agreement to arbitrate, including:

17 (1) the use of a standardized agreement executed by
18 parties of unequal bargaining power;

19 (2) the lack of an opportunity for the customer to read
20 or become familiar with the document before signing it;

21 (3) the use of fine print in the portion of the contract
22 containing the provision in question;

23 (4) the absence of evidence that the provision was
24 commercially reasonable or should reasonably have been
25 anticipated;

26 (5) the terms of the contract, including substantive
27 fairness;

28 (6) the relationship of the parties, including factors
of assent, unfair surprise, and notice; and

(7) the circumstances surrounding the formation of the
contract, including setting, purpose, and effect.

1 Bernal v. Burnett, 793 F. Supp. 2d 1280, 1286 (D. Colo. 2011)
2 (citing Davis v. M.L.G. Corp., 712 P. 2d 985, 991 (Colo. 1986)).

3 There are some factors here that weigh in favor of a finding
4 of unconscionability. Although Plaintiff may have been able to
5 find a job elsewhere, Defendant held the majority of the power in
6 this situation. Plaintiff has submitted a declaration stating
7 that he was told by his managers and human resource
8 representatives that the terms in the contracts were non-
9 negotiable, and that he did not understand the Employment,
10 Confidential Information and Invention Assignment Agreement to
11 apply to anything other than confidentiality and intellectual
12 property matters.

13 Plaintiff also argues that the adhesive nature of the
14 contract weighs strongly in favor of a finding of
15 unconscionability. However, after Concepcion, district courts in
16 Colorado applying Colorado law have found that they have "no
17 alternative but to discount the weight to be attributed to the
18 adhesive nature of the Arbitration Agreements at issue here."

19 Bernal v. Burnett, 793 F. Supp. 2d 1280, 1287 (D. Colo. 2011).
20 See also Daugherty v. Encana Oil & Gas (USA), Inc., 2011 WL
21 2791338, at *9 (D. Colo.).

22 Plaintiff also argues that the lack of mutuality "renders an
23 arbitration agreement presumptively, if no [sic] per se,
24 unconscionable." Opp. to Mot. to Compel Arbitration, 10.
25 However, under Colorado law, "'every contractual obligation need
26 not be mutual as long as each party has provided some
27 consideration to the contract.'" Vernon v. Qwest Communications
28 Int'l, Inc., 2012 WL 768125, at *16 (D. Colo.) (quoting Rains v.

1 Foundation Health Systems Life & Health, 23 P.3d 1249, 1255 (Colo.
2 App. 2001)). Thus, an arbitration provision is not rendered
3 unfair "simply because it does not require defendant to
4 arbitrate." Id. at *16 (quoting Rains, 23 P.3d at 1255. Here,
5 there is no dispute that Defendant provided at least some
6 consideration for the employment contracts. Accordingly, the lack
7 of mutuality in the arbitration clause itself does not render the
8 entire contract unconscionable under Colorado law.

9 Plaintiff also argues that the requirements that he share
10 half the costs of arbitration and travel to Colorado for it are
11 unconscionable. In Daugherty, a Colorado district court
12 considered a similar cost-sharing provision. The court stated
13 that "where the terms of an arbitration agreement prevent an
14 individual from vindicating his or her statutory rights, the
15 arbitration agreement is unenforceable," and concluded that,
16 because the plaintiffs in that case had submitted affidavits
17 attesting that they were unable to pay costs associated with
18 arbitration and would have to abandon their claims if forced to
19 share costs, the cost-sharing provision was unenforceable and
20 severable. Daugherty, 2011 WL 2791338, at *10-13 (citing Shankle
21 v. B-G Maint. Mgmt. of Colorado, Inc., 163 F.3d 1230, 1234 (10th
22 Cir. 1999)). See also Fuller v. Pep Boys--Manny, Moe & Jack of
23 Delaware, Inc., 88 F. Supp. 2d 1158, 1160-62 (D. Colo. 2000)
24 (same). Here, however, while Plaintiff argues that that these
25 terms are unconscionable because of the additional financial
26 burden that they would place on him, he does not argue that he
27 could not pay these costs or that these terms would effectively
28 preclude him from engaging in arbitration.

1 The agreement to arbitrate was clearly written in the
2 Employment, Confidential Information and Invention Assignment
3 Agreement. There is no evidence that Plaintiff was subject to
4 significant external pressure driving him to sign the documents
5 without taking time to review them or have someone else review
6 them; the evidence suggests that Plaintiff had the agreements for
7 several days before returning them. Based on an overall
8 consideration of the relevant factors, the Court finds the
9 arbitration agreement enforceable as to the covered claims.

10 III. Motion to Dismiss based on Improper Venue

11 Defendant also moves to dismiss the case in its entirety
12 pursuant to Federal Rule of Civil Procedure 12(b)(3) based on
13 improper venue. Plaintiff responds that there is no valid or
14 enforceable forum selection clause.

15 As Plaintiff points out, neither the offer letter nor the
16 2009 Bonus Plan contains a forum selection clause. Although the
17 2007 Bonus Plan does contain a forum selection clause, it is
18 limited to suits "under or relating to this plan," and this suit
19 is not. Further, the 2007 plan was superseded by the 2009 Bonus
20 Plan, which omits such a clause.

21 The Employment, Confidential Information and Invention
22 Assignment Agreement does contain a forum selection clause.
23 However, this clause requires only that arbitration take place in
24 Colorado and does not mandate that actions brought in state or
25 federal court must be brought in Colorado. Thus, to the extent
26 that claims survive in federal court, the Court DENIES Defendant's
27 motion to dismiss them on this ground.
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1 citizenship properly in its amended notice of removal. Plaintiff
2 may also include in his motion any argument that the amount-in-
3 controversy requirement is not met by the claims that remain in
4 this action.

5 Plaintiff has filed a request for a case management
6 conference (Docket No. 42). Accordingly, a case management
7 conference on the claims that remain pending before this Court is
8 set for Wednesday, November 7, 2012 at 2:00 p.m.

9 IT IS SO ORDERED.

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11 Dated: 9/26/2012


12 CLAUDIA WILKEN
13 United States District Judge
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